

## Maryland Law Review

---

Volume 31 | Issue 4

Article 3

---

# The Crisis in Capital Punishment

Charles L. Black Jr.

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Charles L. Black Jr., *The Crisis in Capital Punishment*, 31 Md. L. Rev. 290 (1971)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol31/iss4/3>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# Maryland Law Review

---

VOLUME XXXI

1971

NUMBER 4

© Copyright Maryland Law Review, Inc., 1972

---

## THE CRISIS IN CAPITAL PUNISHMENT

By CHARLES L. BLACK, JR.\*

We are at crisis. For about four years, because of judicial stays necessary to the orderly administration of justice, no human being has been killed by warrant of law in the United States. We have had much time for thought on the subject. If we resume the infliction of death by law, we shall have to answer to ourselves, to the future, to the rest of the world, and to whatever or whomever else it may be that judges us, how it came about that we did this after so much time for reflection. Meanwhile, some 600 persons have been condemned to die, and are in the death cells of our capital punishment states. Of course, not all these will be killed, in any event, for it is the policy in some states to delay clemency hearings until all judicial remedies are exhausted, and some of those now under condemnation will be commuted, or be transferred to asylums, or die. But if the protection of the judicial stays be removed, and if no other remedy supervene, it is reasonably certain that within a year a good many times as many people will be killed in the name of law as in any year in recent American history. Although I am aware that much, indeed most, of what I shall have to say cannot be new, and although I know my subject is a most unpleasant one, I dare not put myself in the position of having to explain to my children how it happened that at such a crisis I could find myself honored by being tendered a platform such as this, at a great university such as this, and then not use this opportunity to have my say on this subject.<sup>1</sup>

---

\* Henry R. Luce Professor of Jurisprudence, Yale University; B.A., 1935, M.A., 1938, University of Texas; LL.B., 1943, Yale University.

1. This piece, as published, is an amplification of the Morris Ames Soper Lecture delivered at the University of Maryland School of Law on March 16, 1972. I am deeply indebted to the Dean and Law Faculty for this invitation, and to the editors of the *Maryland Law Review*, particularly Mrs. Ann Hoffman, for their kind cooperation.

As the piece is in essence a lecture, I have annotated it very lightly. Fortunately, there exists a first-rate compendium on the subject, *THE DEATH PENALTY IN AMERICA* (rev. ed. H. Bedau 1968). My indebtedness to the book is quite general.

I cannot pin down, in many cases, the origin of ideas that come out of years of conversation with Guido Calabresi (who has kindly read and commented on the piece), Alexander Bickel, Louis Pollak, Abraham and Joseph Goldstein, Dr. Jay Katz, Eugene V. Rostow and others of my colleagues at Yale. I have also corresponded with

I cannot be entirely honest with you without confessing a bias — not simply a bias against capital punishment, for I am sure that bias will already have been revealed to you — but a bias against the question's being regarded as discussable at all. The consciousness of this bias came to me clearly one night this winter, as I was walking with my elder son. He and I were together going over some fine point in an argument I was composing in a reply to an eminent public man, concerning this subject. Suddenly we looked at each other, in astonishment at our words and at the framework of public discourse in which they were uttered. One of us, I cannot remember which, spoke both our thoughts when he said, "What are we talking about? We are talking about whether it is a good thing to lead or carry a helpless human being, who could be kept helpless as long as we wanted to keep him so, into a small room, and there to kill him, under warrant of law. How can we be *reasoning*, in the fine grain, about that question?"

There used to be a great deal of earnest talk about torture; with reasons proffered that shifted the balance of conviction to and fro. Many thoroughly decent people, in most cases regretfully, believed in the necessity and propriety of torture, both as a punishment and as a means of ascertaining truth. Then somehow, after several centuries, all this discourse ceased, though nothing changed, or has to this day changed, in the force of the reasons for and against torture as an instrument of law. Torture, somehow, simply became unthinkable as a thing society could do through law. Nobody discusses it anymore. The bias which I must in honesty reveal to you is that I think — or, rather, I feel, for feeling is really what makes torture undiscussible among us now — that this undiscussibility is the position we ought to be in today with regard to capital punishment.

As it is, I have to admit that many people of good will do not regard the capital punishment question as one to which the answer is as obvious as the answer to the torture question now seems to be. By anyone, then, who is not so bigoted as to expect that the opinions of the world must obediently follow his own, the question must be regarded as publicly an open one, however closed the private mind may be. I propose tonight, therefore, to go through the reasons which underlie my own opinion concerning the punishment of death. I shall then mention a few of the constitutional and practical means for dealing with this problem, if the public will to deal with it can be found.

It is necessary for me to mention at this point, parenthetically, the cases now pending before the Supreme Court, wherein is tendered the issue whether capital punishment, as a matter of constitutional law, unaided by statutory judgment, is a "cruel and unusual punish-

---

Lou Henkin at Columbia and William Van Alstyne at Duke. Some of the constitutional ideas expressed herein are obviously related to (though not, as I read them, identical with) those expressed in Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970). I have, through the years of our association, learned much about this, as about most other topics in and outside law, from Jack Greenberg and James M. Nabrit III.

I reserve until last that matchless paladin of this noblest cause, Anthony Amsterdam. I have learned from him, but more than that I have been inspired by what he has done and is doing. He has declared war on death; I am proud (though late-coming) to enlist under his banner.

ment" within the meaning of the eighth amendment. Those cases have been argued by some of the ablest advocates in the world, and I am not going to argue them again tonight, beyond summarily saying that if the punishment of death, and waiting for death, is not "cruel," and if a punishment is not today "unusual" which was inflicted, before the judicial stays stopped it, on some fifty persons a year in the whole country, a tiny fraction of those who had committed nominally capital crimes, then the words "cruel" and "unusual," in the eighth amendment, must be Pickwickian terms of art, bearing almost as little relation to their colloquial homonyms as the word "use" in the Statute of Uses bears to the word "use" in common speech. What I must say tonight is that the forthcoming decision in these cases will either have made retrospectively unnecessary my present remarks, or will have brought it about that the issues I shall discuss become issues of immediate life or death. I hope the first of these things happens; I think it ought to happen; I have spent the year up to now hoping the Supreme Court would shoot this platform out from under me; I have even prepared an alternative lecture, to cover the position if they should have done so today or yesterday. We must proceed for now on the opposite assumption. If the judgment of the Court is wholly adverse on the naked constitutional point, then we must be at the ready, for our work will be just beginning. Without, therefore, either anticipating or much less anticipatorily approving an adverse decision, I shall speak tonight just as I would speak if one had come down, treating the issue as the issue of high policy which would remain wholly open even if the Court should rule adversely on the issue tendered it.

I assert, first, that the punishment of death is an evil, if considered apart from possible justification. To this proposition, after all is said, I cannot logically coerce agreement, but only invite it. As such an evil, it must be condemned if it cannot be justified. I shall then try to show that there is no adequate justification. That is the whole of the case. Now let me try to make it.

Capital punishment is an evil, unless justified, for two general reasons. The first of these is that it extinguishes, after untellable suffering, the most mysterious and wonderful thing we know, human life; this reason has many harmonics, only a few of which I shall sound. The second reason is that this suffering and death must necessarily be inflicted sometimes by mistake. This reason has more branches than are commonly talked about, and I shall therefore lay particular stress upon it.

It is tempting to dispose of the first of these reasons rather summarily. Premeditated killing of a human being is everywhere and by all peoples regarded as a thing profoundly wrong in itself, and therefore as a thing that must be strongly justified if it is under any circumstances to be allowed. One could really stop there, and proceed to inquire into the proffered justifications. But premeditated killing by the law is not quite like other killing.

I shall say very little about the manner of killing. All the means that are in use are quite horrible. I should suppose that any person favoring capital punishment owes it to his own conscience to inquire

fully into the physical facts about that which is being done with his approval. But the manner of killing, which could be changed while the killing remained, does not go to the principle of the thing.

What cannot be changed, apart from the killing itself, is the fear. To say the literal truth about this fear, and about its grosser physiological consequences, even in restrained language, is to incur the charge of sensationalism. This is the standard fatigued old charge which must always be borne by the opponents of cruelty in any form. The charge was patiently endured by the opponents of torture and of slavery; I suppose it must be endured by the opponents of killing in the name of law. I shrink, however (being old-fashioned in taste and finding myself in mixed company), from saying out the known literal truth about many final scenes at or on the way to the execution place. I will go a step back from that, and ask you to imagine — or to try to imagine, for the imagination of terror and false hope and despair is not fully attainable by the fortunate — the situation of the person who waits in a cage to be slaughtered. When he can sleep, one can be pretty sure that he dreams of pardon, only to awaken and to find the clock has moved a little. At first, he may know that the vote of one judge on a fine point of law, or the discretion of a governor on a fine point of extenuation, may save him. Then such possibilities close off, one by one, and he waits, imagining again and again the final agony. I really can't go on with this. I don't have to; it is not my duty to harrow myself, because I am against this thing, and want to see it stopped. But I solemnly assert that those who are still in doubt owe it to their own consciences to think often, and to read much in Koestler,<sup>2</sup> and in Camus,<sup>3</sup> and in the psychiatric literature, on what it does to a human being to be classified as a piece of trash, fit only to be disposed of, and then to be given a while, in close confinement but under close observation, to think about the impending disposition. Perhaps nothing is evil; perhaps the very notion of there being a difference between good and evil is only an hallucination of man himself, a creature not created, but born of the chance collision of the atoms. But if anything at all is evil, then I submit that the imposition of this fear, with its consequences, is in itself an evil of a size too big for language, an evil sternly demanding the clearest and most weighty justification.

Then there is the killing itself, however performed. Here we knock on the door that never opens. But we do know something of what we do by killing. As Camus has put it, we take away all power to make amends or to try to make amends, either on the victim's part or, if the case should turn out to demand it, on our own.<sup>4</sup> How many people now are sorry that Leopold, sentenced to life instead of to death for a revolting crime, made something good of himself and helped many others, and at last had a little freedom after paying so much for his crime? But after all is said, we know very little of

---

2. A. KOESTLER, *REFLECTIONS ON HANGING* (1956).

3. Camus, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* (J. O'Brien transl. 1961).

4. *Id.* at 220.

life, of this wonderful power of choosing and feeling and knowing that has somehow arisen or been created in matter not distinguishable in its constituent parts from the stuff of stones. Here then, with a special force, one can apply the saying of Confucius, "Not understanding life, how can one understand death?" We do not know what we are doing when we kill a human being. Perhaps it is this, clearly or dimly apprehended, that has made mere premeditated killing, even when unaccompanied by any adventitious brutality, a thing looked on everywhere as evil, requiring powerful justification.

We have, then, the killing and the horrible fear. What more? I suppose the most obvious thing is the effect on utterly innocent people, those most likely to love the executed man, his family. Again, I don't have to harrow myself by recurrent reflection on that matter, because I don't want it to occur again, and I mean to do what little I can to see that it does not recur. But if you favor capital punishment, or if you are in doubt about capital punishment, then I solemnly say to you that you owe it to your conscience to ask yourself, and to try imaginatively to consider, how it would feel to go through months of knowing that, for example, your father, or your son, was condemned to death, to watch hope vanish bit by bit, and at last to go to the prison to be given his body, somewhat mutilated, to dispose of. What do you think your chances would be of a happy or even a sane life thereafter? And remember that the people who suffer this are guilty of nothing, nothing at all.

Just a few minutes ago, in so much as alluding to the horrors of execution and of the fear that precedes it, and to the disgusting effects of that fear, I risked the charge of sensationalism. Now I have risked the charge of sentimentalism. Well, if anyone thinks it sentimentalism to feel repugnance at the infliction of the most horrible suffering that could be visited upon a person's kin, themselves utterly innocent, then I venture to suggest that the person who so reacts has himself become pathologically callous, and himself badly needs to take thought. Let him face the facts about capital punishment, abundantly accessible in writing. Let him drop the shabby defense against reality that is contained in the charges of sensationalism and sentimentalism brought against those who have faced the facts. And let him decide afresh whether he really can afford in conscience to go on trivializing this deadly serious issue by such characterizations as "sentimentalism" and "sensationalism." I cannot think that honest reflection along these lines can lead any sane person anywhere but to the conviction that the punishment of death is an unspeakable evil, allowable only if the most weighty and certain justification be put forward.

Before I proceed to examine the second branch of the evil in the death penalty — the possibility of mistake — let me mention a few of what have seemed to many the probable *general* effects of capital punishment in a wider societal frame. I have hesitated before deciding to do this. The death, the fear, and the unearned horror inflicted on the family are all absolutely certain, and are overflowing sufficient in themselves to establish that the punishment of death, if it is to be

used, must be justified by the surest data, purified by the clearest thought. I do not want to weaken that case by introducing matter which is inherently conjectural, however plausible the conjectures may be. But I have decided that my remarks would be incomplete without some allusion to these wider possibilities.

It seems to me very likely that capital punishment tends to brutalize society. Beyond doubt, it conveys one very clear message: human life is a thing that may be taken by the State, either for utilitarian reasons not (as I shall show) in the least established, or for the satisfaction of the desire for vengeance. It seems to me very plausible to conjecture that this message reverberates in society, and tends to make human life seem the cheaper. This conjecture may be made a little more plausible if one asks what the general societal effects of abolition would be. Would not the assertion made by abolition be that human life is very precious? I think it would, but I have no desire to press the conjecture, which is really unverifiable. The death and the fear are enough.

I think, further, that the abolition of capital punishment would convey a most desirable message about the State and its competence and powers. Here I recur to Wordsworth's sonnet, the fifth in his lamentable sonnet sequence *On The Punishment Of Death*. The message of this sonnet is that the State cannot retain full and absolute dignity unless it has and wields the final power of life and death; "she" would be, he says, "self-shorn of Majesty." I heartily agree with Wordsworth's intuition as to the importance of the State's possessing and using this power, as a definitory sign of the State's character; Wordsworth's poetic insight was here deadly accurate. What I would disagree with is his conclusion that the use of this power defines a concept of the State that we need in these times, or in any times. Capital punishment defines the omnipotent State, the State that can and will do anything to its citizens — even kill them after they have been rendered utterly helpless. The difference I have with Wordsworth is that that is just exactly the kind of State I do not want. Of course the State *can* kill its citizens. Authentic majesty would, for me, be found in its solemnly deciding that it will never do so.

Finally under this heading of general effects, let me take up the problem of the effect of capital punishment on the treatment of prisoners in general. Without, again, pressing the point — for it is only a conjecture in social psychology — I suggest that the fact that society is willing to kill some people tends to define the limit of what society will do to its deviant members, and so to make every other form of treatment of them, however brutal, seem less than extreme. The abolition of capital punishment would move the line; there would then no longer be possible a sort of vague emotional a fortiori argument generating the feeling that, since men who transgress the law may be killed, those who are not killed are getting a break, and have no reason to complain of their treatment. This consideration, if it has any validity, would be a partial and collateral answer to those who argue that capital punishment is no worse than long imprisonment, given

the conditions in today's prisons, for it might hold out hope that the abolition of capital punishment would be a first step in still further self-limitation on the part of society. (One full and directly responsive answer to the argument — the only humane argument I know in favor of the death penalty<sup>5</sup> — is that those who put it forward cannot, be it said with greatest respect, mean what they seem to be saying, for their argument, if valid at all, would lead to a very large multiplication of executions, perhaps by a factor of hundreds, not only for murder but for a great many other crimes. A second and equally full answer would be that at best the choice should be left to the person affected,<sup>6</sup> and that few if any sane prisoners condemned to death have ever indicated anything but a strong preference for commutation.)

But let me put all the immediately foregoing material, on general societal effects and on effects upon prison life, in its place. It is conjectural. What is sure, once again, is the killing, the dehumanizing fear, and the suffering spread among innocent people who love the condemned man. These things, I repeat, are enough. If they are to be continued, they ought to be justified — not by guesses, not by smirking ironic questions, but by the solidest fact and the solidest reason.

The second chief heading of evil in the punishment of death is the possibility of mistake. If you have concluded, perhaps with shrinking regret, that it is necessary and proper to kill the right man or woman, with all, as I have just reminded you, that that entails, then I submit that you must nevertheless concede that there is in the whole universe of moral possibility hardly anything more horrible than the killing of the wrong man or woman. Yet I doubt, from what reading I have done, that the subject of mistake in the infliction of death by law has yet been accorded comprehensive justice.

First, let me remind you that the word "possibility," so innocent in its sound, can be quite misleading. It is so easy to move from "possibility" to "some possibility," thence to "bare possibility," and thence to a dismissal of the subject from the mind. This progression is quite unwarranted. In no other branch of human action, of human judgment on controverted matters of fact or law, would we regard the possibility of mistake as negligible. The concept of reasonable doubt, where taken seriously, reduces the risk. But it also verbally encapsulates and sanctions the risk of mistake, for it permits and

---

5. See Barzun, *In Favor of Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 154 (rev. ed. H. Bedau 1968). I do not mean to suggest that Professor Barzun commits himself to this argument, but the considerations (undoubtedly founded in fact) which he urges seem to me to lead toward it; I have actually heard it put forward in serious conversation, more than once.

6. See Bedau, *Death as a Punishment*, in *THE DEATH PENALTY IN AMERICA* 219 (rev. ed. H. Bedau 1968). For my part, I would strongly oppose euthanasia for prisoners electing it, because I would fear that, under prison conditions as they now stand, life might, in some places, designedly be made unendurable for those known to have this choice open to them. This danger would be compounded by the fact that there could be no rational ground for confining the "privilege" to the worst criminals, or indeed, for limiting it at all. Like all other kinds of "euthanasia," therefore, but with peculiarly acute dangers, it runs the risk of the operation of outside pressures for nominally "voluntary" death. But all this, as Bedau makes perfectly clear, has nothing to do with capital punishment.



directs conviction not only in that case (if such a case could ever be found) where there is no doubt at all, but also in the case where doubt exists, but is regarded as unreasonable. That standard openly defines a system wherein execution is possible though some doubt remains.

A second absolutely vital point is that the possibility of mistake, however small in each single case, adds up to affirmative probability in a long run of cases, and to virtual certainty in a sufficiently long run. To say that human judgment is fallible in capital cases, as it is fallible everywhere else, is the exact equivalent of saying that a mistake will certainly once in a while be made. That which is fallible sometimes fails. So let us be clear about it: the evil of capital punishment consists not only in inflicting the cruelty to which I have just been rather politely alluding on those who by societal standards deserve its infliction. It consists, with practical certainty in the long run, in the infliction of that cruelty on some people who do not meet those standards, who have not in fact deserved to suffer so, even under the rules society has set. I do not say that nothing could possibly justify the decision that the wrong man is once in a while to be tortured by fear and then killed. But I do say that the justification for such a horror must rise to a height almost beyond attainment by any prudential or moral consideration.

But we have only begun to consider the problem of mistake. I find that when most people, even most writers on this subject, think of "mistake," they think of a certain rough kind of mistake, the mistake that consists in a finding that the defendant killed the victim, when in fact he did not do so. That kind of mistake can happen; in the long run, it must sometimes happen, and in a few cases it has been shown, with high probability, actually to have happened. But it is very far from being the only kind of mistake that counts. For we have not committed ourselves, as a society, to kill or even to punish every person who kills somebody else. We have, exactly to the contrary, committed ourselves not to kill, and in many cases not even to punish, many of those who kill other people. And — since this is just about the most serious matter with which our society, as a society, deals — we have to assume that this commitment is seriously binding, and that a grave mistake has occurred if a person be executed who falls, as to *any* of the rules we have committed ourselves to, on the wrong side of the line.

First of all, and simplest of all, we have committed ourselves not to execute people, even though they have killed others, where certain gross factual conditions are found to have existed in connection with the killing. A defendant may, for example, admit that he killed the victim, and this may seem certain beyond any possible shadow of doubt, but he may plead self-defense, claiming that he reasonably feared for his own life or bodily safety. The trier of fact must pronounce on the validity of this defense. In the first murder trial I remember — one held perhaps forty-five years ago in Texas — the defense was that the defendant thought the victim was reaching for a gun, though in fact he was reaching for a handkerchief. As it happens, the jury acquitted. But the defendant was a minister. Would the jury have

acquitted if the defendant had been a shift-eyed drifter? I don't know for sure. All I need to know, and all you need to know, is that mistake, in regard to the validity of the plea of self-defense, is a clear and ever-present possibility.

We have committed ourselves not to kill, though not to refrain from punishing, one who accidentally kills another. I need not go through examples to convince you of the obvious fact that mistake is plainly possible — even quite likely — with respect to this commitment. In many cases, nobody will really know the truth about this except the defendant; the jury has simply to make a plausible guess based on circumstances. Yet, if you assume the jury is right nine times out of ten on this issue — a pretty good performance, after all — then a little elementary arithmetic will convince you that in a run of only eight cases it is more likely than not that a mistake will be made.

So far, I have sampled only what I may call the grossly factual mistakes possible in any fact-finding process. Let me pass to mistakes involving a mixture of matters which are progressively more difficult to classify as purely factual. But in doing so, let me strongly remind you that we have in this most serious of matters committed ourselves not to kill anyone whose case falls on the exculpating side of any one of the lines I am about to mention. The fact that the lines become progressively more difficult to draw or to locate does not excuse us from the unspeakable offense of executing the wrong man. It only makes it enormously more likely that we will do so.

Let us, then, pass on to the concept and the clouded reality of "premeditation." This takes us back to the distinction introduced rather generally in the last century, between "first-degree" and "second-degree" murder.<sup>7</sup> It is familiar and despairing learning, to those who have written on the subject, that the distinction between "premeditation," which makes one eligible for the gallows, and absence of "premeditation," which does not, is in close cases virtually impossible to state with any clarity. Yet we must sometimes submit an issue so framed to the finder of fact in murder cases, and in those cases it is the crucial issue. How likely do you think it is that the finder of fact — the jury — will always be right in resolving it? Yet its right resolution goes to our moral life and death as a society; if we premeditatedly kill one as to whom this issue has been wrongly resolved, then we, and not he, are guilty of first-degree murder, rendered immune from punishment only by the fiction, the arrogant fiction without cozening ourselves with which we could not bear to inflict capital punishment at all, that we are always right.

I come now to the issue of "insanity." We are committed, as a society, not to execute people whose action is attributable to what we call "insanity" or who are mentally incapable of standing trial, or who are what we call "insane" at the time of execution. As to the second and third of these, little need be said. In judging a defendant's capacity to participate effectively at his trial, we take into account neither low intelligence, unless, perhaps, he is clinically an imbecile,

---

7. Bedau, *General Introduction*, in *THE DEATH PENALTY IN AMERICA* 25 (rev. ed. H. Bedau 1968).

nor cultural inaccessibility, to him, of any understanding of the proceedings, just as we disregard his lack of financial resources to engage able counsel or to set afoot investigation that might clear him. As to insanity at the time of execution, this is so familiar a phenomenon in fact, and the procedure for ascertaining and acting upon it is generally so defective, that the thing speaks for itself. Obviously, mistake is easily possible in either of these two respects, and doubtless often occurs. Let me focus on so-called "insanity" as a defense.

Once again, let us remember that we have committed ourselves not to kill by law, or even to punish, anyone who satisfies certain criteria as to the connection of "insanity" with the commission of the act. Yet the astounding fact is that, having made this commitment, for what must be the most imperative moral reasons, we cannot state these criteria in any understandable form, in any form satisfying to the relevant specialists or comprehensible to either judge or jury, despite repeated and earnest trials. The upshot of the best writing on the subject is that we have so far failed in defining exculpatory "insanity," and that success is nowhere in sight.<sup>8</sup> Yet we have to assume, unless the whole thing has been a solemn frolic, that we execute some people, and put others into medical custody, because we think that the ones we execute fall on one side of this line, and the others on the other side.

I am talking about mistake, and it is hard to apply the concept of *mistake*, of rightness or wrongness, to the application of criteria of the quality we have succeeded in expressing, criteria which we do not ourselves even pretend to understand. But what a fearful alternative faces us here! Either mistake is possible as to the application of such criteria, and therefore extremely likely to occur, given the quality of the criteria, or else the criteria themselves are quite meaningless, and mark no line. If the latter is true, then we are executing some people, and treating others medically, on an irrational basis.

It would not be surprising if this were so, for we are dealing here, in truth, with philosophic issues which philosophy has quite failed to resolve — issues of determinism, free will, and responsibility. But we are not debating these issues philosophically. We are putting some humans through inutterable agony on the basis of a pretense, nothing short of frivolous, that we have satisfactorily resolved these issues. How can we dare go on doing this?

I want now to digress, briefly, to cover a special problem which seems to fit here better than anywhere else. As I have worked on this lecture, I have, of course, talked it over with many people. I want to mention now one particular view which I have encountered several times. I have heard it said, by people I must respect, that they generally deplore the use of capital punishment, as to almost all killings — the *crime passionel*, the street-fight knifing, or even the fatal mugging for money — but that they believe a few crimes — the Sharon Tate murders, for example, or the multiple mad killings by Starkweather —

---

8. See A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967) *passim*, especially 213-14. (I do not, of course, mean to associate Dean Goldstein in any way with my own remarks on the possibility of mistake in application of the insanity "tests.")

to be so horrible as suitably to be atoned only by death. I introduce this special view at this very point in order to focus attention on the fact that it is precisely as to such crimes that we run the greatest chance of misapplication of the insanity "test" to which we must be taken solemnly to have committed ourselves. This is true, above all, for an intrinsic and inescapable reason. Where the killing is of a kind colloquially describable as mad, and actually is so described in newspaper headlines, where the crime exhibits a total wild departure from normality, we come exactly to the point where consideration of the insanity problem is at once most necessary and most difficult. The man who kills his wife's lover in a fit of rage is not necessarily mad at all. To call sane the man who, for no visible reason, walks into a barber shop with a Tommy gun and shoots a dozen barbers and customers, is to call into question our deepest assumptions as to what sanity, in social life, can possibly mean. We must, in such a case, face the issue of exculpatory insanity. But I have already reminded you that the tools we have elaborated for resolving it are about as useful as flamingoes are for playing croquet. In every case, therefore, of the supremely revolting murder, we face in particularly acute form the exculpatory insanity question, without adequate means, to say the very least, for answering it. How likely is it that we will answer it rightly? Before we frame our reply to that question, we have to face the further realistic fact that the issue of "insanity" is referred, with inadequate if not totally meaningless directions, to people who must, if they are normal, view the defendant with extremest abhorrence. I suggest that those people who disapprove of the death penalty in general, but who would apply it in such cases ponder these facts.

(I should point out here, parenthetically, that it is only with respect to the punishment of death that our insane "insanity" rules do major damage. If a "sane" man is mistakenly classified as "insane," and confined indefinitely in a state hospital, then that is in itself a very heavy punishment. If an "insane" man is mistakenly classified as "sane," and sentenced to that indefinite imprisonment we call "life," then his condition can be, and is, reviewed medically from time to time, and he may be, and sometimes is, transferred to a hospital. The difference is of an altogether different order of magnitude from the difference between killing and not killing.<sup>9</sup> I hope, also parenthetically, that I will not be taken to have implied that people like Starkweather could ever safely be turned loose, under any foreseeable state of the art of psychiatry.)

I believe I have now adequately sampled the possibilities of mistake with respect to the question of guilt in the narrow sense, and I believe I have said enough to show that the possibility of mistake in that regard is not a simple one, involving the mere question whether the defendant did it or not, but rather a very complex one, ranging into the puzzling but tragically real possibility of mistake in application of rules notoriously refractory to the best-instructed human understanding. To make the picture complete, I must now go into the

---

9. *Id.* at 20.

possibility of mistake with respect to judgments which are openly advertised as "discretionary," with no standards set out in words. Executive clemency has always been like that. A recent case in the Supreme Court holds that due process of law does not require that any verbally expressed standards be given to the jury that is to choose between life and death for the defendant, but that that matter is to be left in their discretion.<sup>10</sup> So be it, or rather, so must it be. But this makes discretionary decision, without publicly expressed standards, a major part of the capital punishment system. If juries and governors and pardon boards select men who are to live by the exercise of standardless discretion, then they are selecting men who are to die by standardless discretion.

Can one properly speak of "mistake" in the exercise of "discretion"? Some of the most interesting recent jurisprudential work has been done on that question.<sup>11</sup> I cannot be sure that I have understood in more than a rough way what the legal philosophers have been concerned about. But my own interpretation, which in any case seems to me inevitably correct as far as it goes, is that we have to choose between two things, or a mixture of them. The first alternative is that, though discretionary judgment is not bound by any verbal standards, it is bound by standards that cannot be or at least are not expressed in words. If that is true, then a discretionary decision may be right or wrong, in that it implements or fails to implement the unstated and perhaps unstatable standards that bound it. If this alternative is right, then it is clearly possible that a jury or a governor may make a mistake in selecting which man is to die and which to live, and that, given the absence of authoritative verbal expression of standards, mistake is likely and even invited. Under the other alternative, the one that says that discretion is bound by no standards, stated or unstated, statable or unstatable, mistake would be impossible, for there is nothing to be mistaken about. But how dreadful (again) that alternative is! For if the decision of life or death is not being made by standards, as to which mistake is possible, then it is being made on some other basis — whim, prejudice, chance, or some blind unconscious factor. The psychological fact in most good faith decisions labelled as "discretionary" probably is a mixture of these two things — some vaguely-felt standards and some degree of uncontrolled hunch or impulse. But no imaginable mixture is any better than either of the alternatives in isolation.

Now I have depicted the capital punishment system, first as a system breaking violently, in the name of law, on the greatest of mysteries, human life; as a system imposing the most horribly cruel and prolonged fear on those who are caught in it; as a system visiting utterly undeserved indelible horror on their families; as a system containing multiple serial possibilities of mistake in selecting those who are to die, with very probably, an element therein of prejudice and caprice. Leaving out the minor points I have made, I think that is an accurate description of the system — sensational, to be sure,

---

10. *McGautha v. California*, 402 U.S. 183 (1971).

11. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32 *et seq.* (1967).

because the subject is sensational in its nature, and sentimental, if you like, because it is only sentiment, after all, that makes us abhor cruelty, or see human life as a mystery, just as it is only sentiment that makes us love our children. Saving such epithets, however, I submit that the picture I have drawn is true and undistorted.

Such a set of practices is a very great evil in itself. It cries rather than calls for justification. Let us now examine the justifications proffered.

The only practical or utilitarian justification, of a magnitude even arguably commensurate with the facts of the capital punishment system, is the allegation that capital punishment deters potential killers, and so saves innocent lives. If it were known, to any substantial degree of probability, that innocent lives were saved by this punishment, then those of us who oppose it would be bound to re-search our hearts and minds.

As has often been pointed out,<sup>12</sup> it is very important to be precise as to the question here being asked. One is not asking whether capital punishment would have deterrent force if it were the only penalty, and impunity the only alternative. I should think it completely obvious to common sense that, in this imaginary case, capital punishment would have at least some deterrent force. But that is not the question. The question is whether the whole of the evidence makes it substantially probable that the threat of capital punishment has *greater* deterrent force than the threat of long imprisonment.

Now the short facts about the deterrence question are these: after comprehensive study, not only is it not known to any slight degree of probability whether capital punishment has this differential deterrent effect, but, for systematic and easily comprehensible reasons, it can never be known whether this effect exists, barring some radical and utterly unforeseeable breakthrough in the relevant methodology. The first of these propositions is the consensus, I believe, amongst all competent persons who have studied the subject, and who claim to speak on the basis of the evidence. The second proposition is really a by-product of the studies which have been conducted, for it is in the course of their conduct that the following insights have emerged:

First, there is no possibility of any adequate control, in the scientific sense. All you can do is compare homicide rates in the same state during periods when it does and periods when it does not administer capital punishment, or compare states that have capital punishment with states that do not. But no state is in the same social condition at one time as at another, and no two states are exactly alike at any one time. Variances, therefore (and the variances tend to be small), could easily be attributable to other factors than the presence or absence of capital punishment. (Lest I sound apologetic here, let me say that the raw statistics, viewed absolutely uncritically, show that there is more homicide in capital punishment states than elsewhere,<sup>13</sup> but I certainly do not want to make anything out of that.)

---

12. Bedau, *The Question of Deterrence*, in *THE DEATH PENALTY IN AMERICA* 261 (rev. ed. H. Bedau 1968).

13. *Id.* at 262.

Secondly, we have no reliable statistics on capital homicide, and, more important, we will never have such statistics, because most people who are charged with homicide plead guilty to a lesser offense, or have their cases disposed of in some other way. We do not know, and never can know, whether any one of these would, if charged and tried, have been found guilty of first-degree murder. There is not the slightest reason to think this pattern will change. (There is no reason, either, to think that the proportion of undetected capital homicide is invariable.)

Thirdly, it is known for sure that *some* persons use murder as a form of suicide, killing in order to be killed,<sup>14</sup> but we have no way, and never will have any way, of knowing how many. This phenomenon is not surprising; one could be pretty sure that it must be the case. There are a great many suicides in this country. It is well known that one of the main things standing in the way of suicide is irresolution — sheer inability to perform for oneself the final fatal act. What could be more natural than the would-be suicide try to produce a situation in which, as in his disturbed condition he believes, the state will do the job for him? And of course we now know that the impulse to self-destruction is sometimes unconscious, and may easily be the real motive for some killings that seem senseless on any other ground. Such cases may balance out any deterrent effect, but we cannot know whether that is true or not, because we cannot know how many such cases there are, or how much deterrent effect there is, if any.

Any one of these three reasons, considered independently, stands athwart the path to any firm scientific conclusion about deterrence, one way or the other. Together, they make the position quite hopeless. No responsible person can assert (or, as far as we can foresee, ever will be able to assert) that capital punishment does or does not deter. (It may be added that I have shown this assertion to rest on grounds of which any court may readily take judicial notice.) All we can say is that it obviously doesn't deter very much, for if it did the effect would be unmistakably noticeable as between the retention and abolition states, and it is not. It is even possible, in this state of ignorance, that the deterrent effect, if there is one, may save fewer innocent lives than are taken through mistake by the death penalty.

If evidence fails us, then it is reasonable to pass from evidence to common sense. When I do this, I encounter insuperable difficulty. Like you, I have never come close to considering the killing of a human being; I have never been on anything like intimate terms with anyone who has. The mind of a person premeditating a murder is a mind unknowable to me; I can only attempt to imagine its state. Insofar as I can perform that act of imagination, my own common sense advises me, with all the appropriate incertitude, that a mind so far gone down a strange and wild path would probably not be swayed by the difference between possible (though highly improbable) execution and possible (and much more probable) long imprisonment. But whichever hunch I had, I would look on it as a totally unsatisfactory basis for

---

14. *Id.* at 264.

putting human beings through the agony of dying by deliberate publicly sanctioned killing, and of waiting for that end — particularly as mistake is, in the long run, certain.

Evidence and common sense seem to leave the matter of deterrent effect in equipoise. As lawyers, then, I think we have to ask where we want to place the burden of proof.

Does it not seem plain that the burden of proof ought to be on the proponents of legalized killing? Capital punishment is very cruel — in all the ways I have shown. If this cruelty is to be inflicted in the name of deterrence, then a solid evidentiary case should be made for the superiority of capital punishment as a deterrent. That case has not been made. It cannot be made. Summarily (so far as deterrence goes) we are inflicting this cruelty without in the least knowing whether it does any good. That is strong language. But does it not precisely summarize the case? Do we not shrink from its strength because we know it is true, rather than because of its extremeness of expression?

I think this about disposes of the only full, rational argument in favor of capital punishment. Other arguments are more difficult to answer, because it is more difficult to make out what is being asserted. I have more than once been confronted with an argument from history, which seems to boil down to the assertion that capital punishment is a very old institution, practiced *semper et ubique et ab omnibus*, and should in consequence (as I understand the argument) be continued. It is difficult to state this argument in plain form without appearing to caricature it, and perhaps that is all the answer it needs. But its proffering does serve the useful purpose of reminding us that one may derive an exactly opposite suggestion from history.

The relevant history, it seems to me, has in all civilized nations uniformly been one of gradual and then drastic reduction in the number of crimes for which this punishment may be inflicted, and in the number of cases, even of such crimes, in which it actually is inflicted. This historical movement includes, of course, progressive eliminations of refinements of cruelty in infliction, and has in recent times moved toward its culmination in a world-wide trend to complete abolition, realized in many countries and in some of our states. In the United States, even before the recent judicial stays, capital punishment had become vestigial — a token payment, as it were, to some sinister lurking creditor, made at fearful cost to a few. The ecumenical movement of history is strongly and unambiguously against the retention of capital punishment.

I would not dismiss out of hand those who sincerely feel that the Bible commands the infliction of capital punishment. I would only remind them that, even for the impeccably orthodox, there is no more perplexing question than the question to what extent the Mosaic law was for a certain people in a certain time, and to what extent it binds all Jews or Christians forever. Directly to the present point, most of the Mosaic law as to capital punishment is not followed, has not been followed, and never will be followed by any modern civilized nation. Anyone who advocated its literal following in all its branches would



be thought, to say the least, very peculiar.<sup>15</sup> I have great respect for the Bible as a repository of religious and moral wisdom, but in this matter we are not considering whether we shall exactly follow the Mosaic injunctions — no one among us would advocate that or anything near that — but whether, having departed from them almost all the way, we shall depart the rest of the way. And I think it not inappropriate to remind you that the first recipients and eternal guardians of the Law of Moses very early conceived a strong repugnance to the death penalty, and elaborated so intricate a set of procedural requirements as to make its infliction virtually impossible among them.<sup>16</sup>

I am afraid that all we come down to at last is retribution, or, to give it its shorter name, vengeance. I think we all know that capital punishment would not last two weeks, anywhere, if it were not supported by the naked desire for vengeance, felt by enough people, intensely enough, to support the continuance of the token payment we make.

There is not much rational you can say about vengeance. No logical or experimental demonstration can show that the desire for vengeance is wrong, anymore than such demonstration can show that murder is wrong. There are, however, some peripheral things one can say about the retribution or vengeance motive.

Vengeance restores nothing. In the typical angry letter to the editor, the writer charges that opponents of capital punishment, preoccupied with the sufferings of the condemned, are callous to those of the victims of crime. This is, of course, a silly falsehood, wantonly uttered, for not even a fool could find validity in the inference that those who would stop killing where it can be stopped must be callous as to the victims of other killing, and as to their kin. But it also ignores the fact that the slaughtering of the killer does nothing for the one already dead, or for the bereaved family. No balance is redressed, no restitution effected. Payment of a sort is exacted, to be sure, but of that payment there is no recipient. The name for that kind of payment is vengeance, pure and simple.

It ought also to be said here, as so many others have said, that the payment which vengeance, in its death-penalty form, exacts is in most cases, even under the *lex talionis*, grossly out of proportion to the crime. This is obviously true as to such crimes as armed robbery. But few murderers possess either the means or the combination of ingenuity and diabolic derangement requisite for a crime corresponding, in prolonged and resolute cruelty, to the penalty exacted. The few who do are probably in all cases visibly mad.

But in the end, as I have said, one comes at last, as with all moral questions, to the naked choice. Reason leads and then leaves you there. One has to decide for oneself whether the desire for vengeance is to be indulged. The conflict at last, after reason has done all it can, is between the desire for vengeance on the one hand, and on the other, the desire to avoid great cruelty, sometimes, inevitably, inflicted by

---

15. See, for one example among many, *Leviticus* 20:9.

16. Kazis, *Judaism and the Death Penalty*, in *THE DEATH PENALTY IN AMERICA* 172 et seq. (rev. ed. H. Bedau 1968).

mistake. These desires are equally sentimental; the first is as much a sentiment as is the second. One has simply to choose between incompatible sentiments.

I do think there is a clear duty incumbent on those who favor capital punishment, or who are in doubt about it — the duty of inquiring and pondering. There is the duty, first, of finding out the real facts about the infliction of death, about the minutes preceding the infliction of death, and about the months of fear. There is the duty of probing fully, along the lines I have indicated, the multiple possibilities of mistake, and even of caprice. There is the duty of evaluating intelligently, on the basis of full information, the truth or falsity of the assertion I have made that the differential deterrent effect of capital punishment is not known and cannot be known. I cannot think how a person could even so much as acquiesce in the imposition of the death penalty without making and continually renewing these inquiries, and not tremble for fear that he may, after all, be incurring a judgment. Indeed, he is incurring a judgment — his own judgment, conscious or unconscious, that he has let people be killed without asking any questions, except the sardonic question of Cain, to which the dooming affirmative answer thundered in silence, and thunders through the ages.

I am entirely confident that most intelligent people who make these inquiries will come to see that capital punishment rests on no rational ground, but only, after all, on the desire for vengeance, and that they will reject that desire as an inadequate and unworthy justification. From now on I shall speak to and for those who have so chosen, talking about ways and means, while asking you to remember, again, that we are at crisis.

Two main problems present themselves. First, how shall we generate a public resolution that capital punishment be abolished? Secondly, through what constitutional means may that resolution drive to effect?

As to the first of these, the answer is as various as opportunity. Everybody talks to other people; talk about this. If, as has happened to me here, you get a chance to speak to an audience on a topic of your own choice, speak about this. You may find, somewhere near, a society against capital punishment; join it. Remember, the next few days, weeks, and months are crucial.

You will want to approach your representatives, in the state legislatures and in Congress, in both houses of both these bodies. Having known and dealt with a good many people in these positions, I would say two things. First, they are impressed by sober intensity of interest as well as by mere head-count; the person who will take the trouble to go to the capital city and get in touch is likely to exert much more influence than the man who listlessly answers "yes" or "no" to a pollster at his door. Secondly, legislators are, by and large, accessible to reason, are quite capable of understanding, and are anxious to do right. Of course they are bounded by the lines of political possibility. But change as to capital punishment has now come within those lines. And within those lines very many of those in power are

persuadable by cogent argument. For this reason, the carefully structured oral presentation, or the closely reasoned letter, is likely to have much more effect than the mere statement of one's conclusion.

If interest in this problem, and opinion favoring abolition, can be generated, then what are the structural means for change?

Most obviously, the state legislatures, one by one, might abolish capital punishment. Governors possessing clemency power might be induced to exercise it generally, as some have already done. As a constitutional lawyer, I don't think I need to say any more about these obvious possibilities. I want to pass on to some not quite so obvious.

I believe it can now be said to be the consensus among academic constitutional lawyers of standing that Congress has the power to abolish capital punishment for the entire nation, for state as well as for federal crimes.<sup>17</sup> No two lawyers reason exactly alike, but, broadly, the grounds of this congressional power are two. First, Congress could very reasonably conclude — indeed, it is hard to see how it could fail to conclude — that capital punishment has for some time been administered in a racially discriminatory manner, and hence is likely to continue to be so administered. This conclusion would bring capital punishment squarely within the rationale of *South Carolina v. Katzenbach*<sup>18</sup> and *Oregon v. Mitchell*,<sup>19</sup> cases which held that where a device, innocent in itself, is shown to have been used as a vehicle for racial discrimination, Congress may altogether forbid the use of the device. Secondly, the fourteenth amendment incorporates the eighth amendment,<sup>20</sup> which forbids the imposition of cruel and unusual punishments. In section 5 of the fourteenth amendment, Congress is given the power to enforce that amendment — including, of course, whatever is incorporated in it. Thus, Congress has the power to enforce the ban on cruel and unusual punishments. Now these words — cruel and unusual — are vague. Part of the process of “enforcing” vague standards is the process of making them more concrete. There could be no more natural and proper exercise of the power of enforcing this standard than congressional findings that capital punishment is indeed cruel and unusual. Congress is the uniquely fit body for declaring the national sense and will on this question. And let me emphasize strongly that such action would not be made improper by a judicial decision (if, as I hope will not be the case, such a decision should come down) that, *without* the aid of congressional findings and action, the words standing alone could not serve as a ground for striking down the death penalty. Such a judicial decision would probably have been uttered, *mutatis mutandis*, as to the “devices” which Congress was held to have power to abolish, in the two cases just cited. It would make neither common nor constitutional sense — and let us hope

---

17. See the letters put in the *Congressional Record* by Senator Hart in introducing his moratorium bill (note 21, *infra*, and accompanying text), 117 CONG. REC. 7919-31 (daily ed. June 1, 1971). See also Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 19 (1970).

18. 383 U.S. 301 (1966).

19. 400 U.S. 112 (1970).

20. See *Robinson v. California*, 370 U.S. 660 (1962); *Louisiana v. Resweber*, 329 U.S. 459 (1947).

that these march along together — to equate the situation in which the people's representatives have fixed a concrete meaning on these vague words with the one where they have not done so.

The most important legislative proposal on capital punishment is the Hart-Celler bill,<sup>21</sup> now under consideration in Congress. That bill, basing itself on the foregoing constitutional grounds, would impose on the death penalty, whether inflicted by the nation or by any of the states, a two-year moratorium, during which Congress could study its own powers and the subject in general. This bill ought to be the focus of effort today, though not at the cost of abandonment of effort in the state legislatures and with state governors.

I think one amendment to the bill would also be constitutional, and ought to be added, unless its addition would make passage less likely. Congress, if it has a right to impose this moratorium, has a right to do so on humane terms; the attainment of humaneness is as "necessary and proper" as any other objective. I think Congress might easily conclude that, as to persons already under sentence of death, it would be inhumane to keep them in the agony of suspense for two more years. I would therefore favor an amendment to the bill requiring the commutation of all such sentences. For similar reasons, I should think it proper that the bill prohibit not only the carrying out but also the imposition of the sentence of death during the moratorium. In this way, Congress would put itself in the position of writing on a clean slate, without pressure.

If the Hart-Celler bill were to pass in time — with or without the amendments I have suggested — then the way would be cleared for thorough national deliberation on this question. This interim victory would be a great one — perhaps the best we can hope for now, outside of a favorable Supreme Court holding. But we have to face the possibility that an adverse decision of the Court may come down any day, and that the Hart-Celler bill may not be passed in time.

For the constitutional theory I would put forward to take care of that contingency, I can claim no consensus. I have indeed made no wide survey. The theory is my own, as far as I know, but I believe in it and invite you to consider it.

In the event of a gap between an adverse Court decision and seemingly possible passage of the Hart-Celler bill, it is my contention that it lies within the power of the President to provide by Executive Order for a stringently limited moratorium, strictly in aid of proposed legislation and so conditioned as to expire after a stated time, or to be rescinded upon the President's further order. Such an Executive Order would be ancillary to the legislative process, and in no wise in derogation of congressional power, since it would do no more than prevent a cruelly irreversible change in the status quo, pending congressional deliberation. Its issuance would not even imply the espousal by the President of any views on the merits of capital punishment, or on congressional power thereover. It would simply preserve an irrestorable situation, while the Congress deliberated on both these issues.

---

21. S. 1969, 92d Cong., 1st Sess. (1971).

Of course such a suggestion is novel, and must (as have many other now accepted developments in constitutional law) rest principally on constitutional theory rather than on close precedent. The postulates of the theory on which it has to rest are not, however, anything like exotic in our constitutional law.

The theory is a simple one, appearing on the face of the matter. An irreversible change in situation threatens; the possibility looms that many lives may be destroyed, in contravention of what may after deliberation be judged by Congress to be our dearest national moral interests, expressed in the Constitution. The executive power, I contend, may validly act, simply and solely in order that Congress may not be rendered powerless to act with effect. It is, in part, for just such emergencies that executive power exists.

There is, as I have said, no direct and close precedent for this executive action. But neither is there an entire dearth of suggestive authority in the cases. In *United States v. Midwest Oil Co.*,<sup>22</sup> it was decided (by a Bench on which there sat, among others, Justices White, Holmes, and Hughes) that President Taft, "[i]n aid," as his order put it, "of *proposed* legislation,"<sup>23</sup> might validly suspend the sale of certain lands which the Congress had actually, some twelve years earlier, explicitly laid open to public purchase. Approving this action the Court said:

The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and *being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large.*<sup>24</sup>

These words, particularly the ones I have emphasized, would apply, *mutatis mutandis*, to the present issue.

The *Midwest Oil* case is, admittedly, distinguishable on three grounds — none of them, I submit, sufficient to make a difference.

First, that case involved federal property rather than federal interest with respect to the taking of life. The clear statement of this distinction exposes its nearly shameful inadequacy. The United States has, to say the least, as much interest in the sufficiency of deliberation on issues concerning the lives of its citizens as it has in holding on to its property.

Secondly, the *Midwest* opinion rested principally on prescription; the presidential power there exerted, the Court held, had been so long acquiesced in as thereby to be legitimated. But that distinction is far from fatal to the contention I am making, for long acquiescence in a process such as that used in *Midwest* could occur only in a government whose general tone and theory was friendly and not hostile to the enjoyment by the President of such power as is necessary, in affairs

---

22. 236 U.S. 459 (1915).

23. Temporary Petroleum Withdrawal Order No. 5, Sept. 27, 1909, *reprinted in* 236 U.S. at 467 (emphasis added).

24. 236 U.S. at 471 (emphasis added).

of the first importance, to preserve a status upon which legislation may effectively act, rather than being frustrated by intervening events. Concededly, the power I am here upholding does not rest on prescription — far from it. But the very grounds on which *Midwest* is placed suggest the point that such a power as the one now contended for would not be exotic or strange in a system of government that could acquiesce so long in actions of the *Midwest* sort.

Thirdly, the action which I contend is authorized would effect a temporary and provisional incursion on a power *prima facie* belonging to the states, whereas the *Midwest* decision concerned only federal matters in the narrow sense. This cannot be an insignificant consideration in a federal system. But I would direct attention, first, to the smallness of the proposed incursion; all that would be involved, or could be involved, would be a few weeks' reprieve for the condemned, pending consideration by a Congress in which the states, and the people of the states, are fully represented. I would also make the much more important point that nothing is so vital to the maintenance of a sound federalism as is adequate, and therefore unhurried, deliberation on the location of its balances. In the nature of the case, it is in Congress and then in the courts that this deliberation normally takes place. In debating the Hart-Celler bill, Congress will be considering whether the law and the high policy of federalism justify its own intervention. The adequacy of that deliberation, and the efficacy in practice of its outcome, are the very life's blood of sound federalism. An order of the sort which I contend the President is empowered to make, therefore, would be exactly apt to sustaining a sound federalism, in this profoundly important sense. It would go not a step further than insuring that, if Congress should determine that the national power is paramount in the premises, that determination would (if sustained by the courts) be efficacious. Finally, it must be remembered that, even in our federalism, any valid national interest, moral as well as proprietary, is paramount to state interest.

In the end, however, as to a novel question, such as the present, one must turn to the question concerning presidential power stated and, by implication, answered by affirmation of its second branch, in *In re Neagle*.<sup>25</sup>

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?<sup>26</sup>

Condemned men, whose lives may soon be spared by congressional action, are entitled to "protection implied by the nature of the government under the Constitution." During necessary congressional deliberation, only the President can give them that protection.

---

25. 135 U.S. 1 (1890).

26. *Id.* at 64.

It is of high interest, moreover, that the actual judgment in the *Neagle* case, by a step only one removed logically from the general presidential power therein approved, took a man charged with murder out of the hands of the state authorities and freed him. What I am advocating now is a much lesser degree of interference with state power in regard to the punishment of crime — the mere suspension of the administration of a penalty pending congressional deliberation thereon. The quotation from *Neagle* also serves to remind us that our foreign relations are sure to be affected by wholesale executions; this fact might motivate the President to act, and may even serve as a second basis for his power to act.

There is nothing against any of the foregoing in the precedent of *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>27</sup> for the broad and simple reason that at least three of the six Justices in the majority in that case clearly based their concurrence on their belief that Congress had, by implication, forbidden the presidential step taken. By contrast, the step I am here suggesting has not been forbidden by Congress, and would extend no further than to the aiding of Congress by preserving for it the situation upon which it might decide to act. Even Mr. Justice Black's opinion for the Court stressed the ground that Congress was to make policy, and not the President; the action I propose would do no more than enable Congress efficaciously to make policy.

It should be pointed out, finally, that a presidential moratorium order could be and undoubtedly would be tested in the courts, unless Congress acted soon enough to moot any possible test. The President need not, therefore, step back, as in some other sort of case he conscientiously might, from unreviewable innovation. Indeed, presidential action might suitably include directions to the Attorney General to implement the declared moratorium by court action — perhaps, for reasons of expedition, within the original jurisdiction of the Supreme Court — so as to ensure the concurrence of the judiciary on the constitutional question, as a condition precedent to the moratorium's taking effect.

Other possibilities suggest themselves. Under the constitution of any particular state, the governor, even if he does not possess full clemency power, might be held to possess a power, with respect to executions in his state, analogous to that I have advocated for the President. Either state or federal judges, sitting in equity and faced with a threat of irreparable harm quite sui generis, might impose stays pending legislative action, where the latter (either in Congress or in a state legislature) seems definitely possible. Any state legislature, even if unwilling to abolish capital punishment altogether, might be prevailed upon quickly to pass a little Hart-Celler bill, imposing a moratorium for purposes of study. All these possibilities should be fully explored and pushed to the end; others may suggest themselves to other minds.

It is perhaps time to summarize. But I shall not do so; I think my principal points must be fresh in your minds. Let me instead go

at last to the heart of the matter. There once were uttered six tremendous words: "The greatest of these is charity." Law which blushes or smirks at the mention of charity is bad law. Charity is not sending in money; charity is not merely giving other people the benefit of the doubt. Charity — in its human-to-human aspect — is the virtue of connectedness with all other people, of concern for them, of obligation for their well-being. Charity is the belief, and action on the belief, that we are all severally members each of the other. Our society, our whole world, are sick from the want of charity. We pass one another by without looking; that sums up what is wrong. Now we will never attain to within calling distance of full charity; we need not worry about going too far in that direction. But I have been talking tonight, after all, about the extremest possible denial of charity, the denial that stultifies every other move toward charity, namely our claim, and our acting on that claim, of a right officially to classify a helpless human being as a thing merely to be destroyed, a thing with which we have a right to end all relation by deliberately killing him or her after long brutalizing fear. Underlying everything I have said is my belief that we cannot move an inch toward that rough approximation to charity which must be the foundation of any good society, so long as we keep this institution in place. If you agree with me, whether in the same words or in your own, then let us work together, using the ample means afforded by our constitutional democracy, to bring it about that not one person ever again be killed by law in the United States.